



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON, D.C. 20370-5100

ELP

Docket No. 3199-00

20 November 2000

[REDACTED]

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of Title 10, United States Code, Section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 15 November 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The Board found that you enlisted the Navy on 3 August 1993 for four years at age 17. You were advanced to MMFN (E-3) and served without incident until 1 September 1995, when the chief master-at-arms (MAA) filed an incident report alleging that you sexually assaulted and harassed an SR G. SR G made a voluntary statement that during her watch in aft steering on 29 August 1995 you sat between her legs, put your hand on her upper leg and asked if she was ticklish. She claimed that when she asked you to stop, you asked her who she was "getting it from all summer", and if she would to go the boat deck with you. She intimated that boat deck was where people had sex. She alleged that you continued to touch her in between her legs and then her breasts. When she told you to stop, she alleged that you took her hand and put it between your legs. SR G told several other individuals what had happened to her on watch and was told to report it to the MAAs.

Thereafter, you were advised of your rights and provided a written statement to the effect that you did not have a watch on

the 29 August 1995 and provided copies of the watch bills from 27 August to 2 September 1995 to support your contention. However, the watch bill showed that SR G's watch was on 27 August 1995. You stated that there were at least three people on watch at a time but there had been no time during the past week when only two people were on watch. You further asserted that the supervisor on watch made checks on a regular basis. You denied touching or offending any females to a point where they had to tell you to stop.

You were placed on report and an ETC D was directed to conduct an informal investigation into the charges of failure to obey a general order (sexual harassment) and indecent assault. He noted you stood the 1800-2400 aft steering phone talker watch on 27 August 1995 while SR G was standing the 2000-2400 lee helm watch. ETC D questioned a number of witnesses in whom SR G reported the incident, and was told by an SR C that you also approached her in aft steering, but when she told you to leave her alone, you complied. ETC D noted that there was an obvious conflict between your statement and SR G's in that SR G stated the incident occurred on 29 August 1995, but during her interview she stated it occurred on 27 August 1995. ETC D opined that he believed something did happen in aft steering to cause SR G to become emotionally upset. However, there was no physical evidence or witnesses to substantiate the statements of SR G's or you.

On 2 October 1995 you received nonjudicial punishment (NJP) for being disrespectful in language towards a chief petty officer, sexual harassment of a female service member, wearing an earring on board ship, and two specifications of indecent assault upon a female service member. Punishment imposed consisted of reduction in rate to MMFA (E-2), forfeitures of one-half of a month's pay for two months, and 60 days of restriction.

On 5 October 1995 you appealed the NJP as being unjust in that no evidence was presented that proved you were guilty of sexual harassment or indecent assault. The evidence was all circumstantial except for your wearing earrings on board ship. You argued that SR G was allowed to change the date of the incident from 29 August to 27 August 1995, but three days later, the individuals in whom she confided were told that the incident occurred the night before. You asserted that SR G changed the details of her story each time she was asked, that you were not the first one she had accused of sexual harassment during the past four months, and you provided some of the details as you knew them. However, yours was the only case to go to NJP and you claimed that the captain stated before he charged you, "I have no proof, but I'm going to make a judgment call" or words to that effect. The supervisory authority's action on your appeal is not on file in the record.

On 5 December 1995 you received a second NJP for two instances of absence from your appointed place of duty. Punishment imposed was a suspended reduction in rate and 45 days or restriction and extra duty.

On 2 February 1996, you underwent a polygraph examination by the Naval Criminal Investigative Service. You were asked, "Did you place SR G's hand on your crotch" and "Did You touch SR G's breast with your hand?" To both questions you answered "No." The polygraph examiner opined that you were not being truthful when responding to questions. During a subsequent interview, you told the NCIS that you approached SR G's watch station and began to engage in consensual foreplay with her. You claimed that she rubbed the inside of your thigh and you touched her vagina and rubbed her breast with your elbow. You further claimed that when SR G saw your erection she grabbed your entire crotch. However, you stopped the foreplay and returned to your duty station. When asked why you did not say this to your command, you responded that you did not trust the command. Subsequently, SR G was shown your statement to the NCIS and she denied voluntarily touching you, and said that you grabbed her hand and put it on your inner thigh. She stated she pulled her hand away and told you to stop.

On 18 March 1996 you were notified that you were being considered for administrative discharge by reason of misconduct due to commission of a serious offense as evidenced by the 2 October 1995 NJP and making a false official statements that you had not touched a female service member while on watch, as evidenced by the NCIS polygraph examination of 2 February 1996. You were advised of your procedural rights and elected to be represented by counsel and to present your case to an administrative discharge board (ADB).

On 16 April 1996 you appeared before an ADB with counsel. The ADB heard testimony from an HT2 (E-5) on how you came on board ship wearing earrings and were disrespectful in language towards a chief petty officer. An FN testified that SR G told him that she was a compulsive liar, and he heard rumors from other people that she said they had slept together. However, he denied it and said they were nothing but good friends. A LT (O-3) testified to an incident in which SR G took offense to a BM3 (E-4) kissing her at a club, and the BM3 was given a letter of instruction. An SHSN (E-3) stated he had been the messenger of the watch when you were having difficulty leaving ship to go to your wedding because you had come on board wearing earrings. He stated that he did not hear any disrespectful language from you toward the officer of the day. You admitted to the ADB that you lied in your statements at NJP because you were scared and did not think anyone would believe that what happened between you and SR G was consensual. With regard to the earrings, you were getting

married that day, were already late for rehearsal when you went aboard ship, and the earrings were not the most important things on your mind. You admitted to getting boisterous and overassertive when you had to stay until your leading petty officer wrote a counseling chit about wearing earrings. You admitted that you did some things you should not have, but asked for the sake of your family that you not be given an other than honorable discharge but a general discharge.

The ADB found that you had committed misconduct due to commission of a serious offense and recommended that you be separated with a general discharge. The commanding officer concurred with ADB's findings and recommended a general discharge. On 29 December 1996, the Chief of Naval Personnel directed a general discharge by reason of misconduct and assignment of an RE-4 reenlistment code. You were so discharged on 8 May 1996.

In its review of your application the Board carefully weighed all potentially mitigating factors such as your youth and immaturity. The Board noted your contentions to the effect that it was never proven that you committed the acts of which you were accused, SR G lied as to what happened, and this information in your record could jeopardize your future endeavors. The Board concluded that the foregoing factor and contentions were insufficient to warrant recharacterization of your discharge given your record of two NJPs and the serious nature of the offenses that led to your being recommended for discharge. Your contention that it was not proven that you committed the indecent acts is without merit. The commanding officer concluded, based on a preponderance of the evidence, that you were guilty of sexual harassment and indecent assault. In order for him to do this, he had to be convinced that you were guilty of the offenses charged. The Board is loathe to substitute its judgment for that the NJP authority who was on the scene and considered the evidence and testimony. The Board found no evidence of an abuse of discretion by the commanding officer in imposing NJP. Absent such evidence, the Board concluded that the basis for which you were discharged was appropriate and proper. Since you were found guilty of sexual harassment and indecent assault, the ADB's purpose was to determine whether you should be retained or discharged, and the characterization of service. The Board believed that you were fortunate that the ADB recommended a general discharge. You have provided neither probative evidence nor a convincing argument in support of your application. Regulations require the assignment of an RE-4 reenlistment code to individuals discharged by reason of misconduct. Accordingly, the Board concluded that the discharge and reenlistment code were proper and no change is warranted. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director